IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 42 OF 2006

Shri Mahesh Gaonkar,
Police Inspector, Panaji
Town Police Station,
Panaji, Goa. ... Applicant

versus

1. Shri D. H. Kenaudekar,
   Flat No.C-11, Kenkre
   Estate, Santa Cruz, Goa.

2. State of Goa through the
   Public Prosecutor, High
   Court, Panaji. ... Respondents

Mr. S. G. Bhobe, Advocate for the Applicant.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent No.2.

Mr. M. Amonkar, Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 16TH NOVEMBER,2006.

ORAL JUDGMENT

This revision is by the accused and is directed against

Order dated 21-6-2006 of the learned Special Judge, Panaji.

2. Some facts are required to be stated to dispose of the present revision.

3. There is no dispute that the complainant at the relevant time was a Sub Divisional Magistrate and the accused was the Police Inspector in charge of Panaji Town Police Station.

4. Upon a complaint filed by the said complainant, the accused came to be committed for trial to the Court of the Special Judge/Sessions Judge, Panaji by virtue of the Order dated 20-12-2000 of the learned J.M.F.C., Panaji to stand trial for having committed an offence punishable under Clause (vii) of sub-section(2) r/w Clause (x) of sub-section 1, of Section 3 of the Schedule Castes & Schedule Tribes(Prevention of Atrocities) Act, 1989.

5. At the stage of framing of charge, it appears that on behalf of the accused, two objections were taken, for the framing of charge and both the objections came to be overruled by the

learned Special Judge by the impugned Order.

6. The first objection was in relation to the protection sought by the accused under sub-section(2) r/w sub-section (3) of Section 197 of the Code of Criminal Procedure, 1973. The second objection was in relation to the complaint not being filed in accordance with the earlier Order dated 8-11-2000 of the Sessions Judge/Special Judge, Panaji.

7. As already stated, the complainant belongs to a Schedule Caste(Chambhar) and at the relevant time was working as Sub Divisional Magistrate/Deputy Collector and was posted at Panaji. The accused does not belong to any Schedule Caste. The complainant's case in brief, is that he went to the Panaji Police Station in connection with the arrest of Mr. Anthony Fernandes and Mariano Fernandes, the sons of Mrs. Catarina Po Fernandes, a family friend of the complainant, and he saw them seated on the floor and at that time the complainant asked the Police Sub Inspector who was recording some complaint or otherwise as to what was the matter of the said Mrs. Catarina and her sons and at that time the accused came out of his cabin and questioned

the complainant as to why the complainant had come to the Police Station and the complainant replied that he had come to inquire into the matter of the said Mrs. Catarina Po Fernandes and her sons as they were his family friends and at this time the accused in the presence of the said Mrs. Catarina Po Fernandes and her said two sons Anthony and Mariano, and his wife and brother, and others humiliated and insulted the complainant by saying that the complainant had no right to ask the accused and also abused the accused in most filthy language and the abuses of the accused did not end there and the accused in front of all the said persons present insulted the complainant by saying that the complainant was a "low and schedule caste chambar" person and that the accused further insulted the complainant by saying that "the accused wondered as to how "chambars" like the complainant are given such post/status as of the Deputy Collector" and the accused further abused and intentionally insulted the complainant and with the intention to humiliate the complainant in front of all the aforesaid persons said to the complainant that "the job of the Chambar like the complainant should be of making and mending shoes" and thereafter the accused arrogantly said to the complainant to get out of the

office and if not the complainant would be put behind bars. It is also the case of the complainant that immediately thereafter the accused and some other Police personnel pushed the complainant, his wife and brother in one corner and the accused came with a camera and took the photograph and when the complainant's brother by name Gajanan Kenaudekar told the accused that such rude and insulting behaviour was uncalled for, the accused intentionally insulted him with intent to humiliate and call the complainant's brother as "Chambar" and further threatened that in case they did not leave the Police Station immediately, they would be put behind bars.

8. Reverting to the second objection, it appears that initially the complainant had filed the complaint directly to the Special Judge/Sessions Judge and the learned Special Judge had directly taken cognizance of the offence alleged by the complainant but subsequently by Order dated 8-11-2000 the learned Special Judge/Sessions Judge relying upon the case of **Gangula Ashok and another** v. **State of Andhra Pradesh**(2000 CRI. L. J. 819) came to the conclusion that the Special Judge (Sessions Judge) could not take cognizance of the complaint

directly and the case had to be committed to that Court by the concerned Magistrate. The learned Special Judge therefore returned the complaint to the complainant for presentation to the Court of Judicial Magistrate, First Class to be filed there and accordingly the complaint dated 16-11-2000 came to be filed on 20-12-2000. It is not disputed that the contents of the complaint dated 20-9-2000 which was initially presented to the Court of Sessions and the contents of the complaint dated 16-11-2000 are not the same. The only grievance was that it is another complaint which was presented to the learned Judicial Magistrate, First Class and not the complaint which was filed before the Court of Sessions. The only difference appears to be the paper on which it was typed, the paper being different and not the allegations made by the complainant. The complaint dated 16-11-2000 also appears to be only minus the orders passed thereon by the learned Special Judge(Sessions Judge), Panaji. A complaint has been defined by Clause (d) of Section 2 of the Code of Criminal Procedure, 1973 to mean any allegation made orally or in writing to a Magistrate, with a view to take action under the Code, that some person whether known or unknown, has committed the offence but does not include a

Police Report. Only because the complainant chose to transcribe his previous complaint on another paper, it could not be said that the complaint subsequently filed was not in accordance with the Order of the learned Sessions Judge. The learned Sessions Judge, in her impugned Order dated 21-6-2006 after placing reliance on the case reported in (AIR 2003 SC 2704) has observed that there is no statutory bar for filing a second complaint on the same facts where the previous complaint was dismissed without assigning any reasons. The objection that the complaint filed was not presented as per the Order of the learned Sessions Judge has no merit and was rightly rejected by the learned Special Judge, by the impugned Order.

9. The first objection taken was as regards the protection sought by the accused under Section 197 of the Code, has fallen times without number for consideration before the Apex Court as well as before various High Courts. On behalf of the applicant/accused, it has been submitted that the said two sons of Mrs. Catarina Po Fernandes were arrested by the accused and at the time the offences by the complainant were allegedly committed by the accused, the accused was doing his duty as a

Police Officer as since the alleged offence fell within the scope of his duty or purported performance of his duty, the same came within the purview of the protection given to an accused under Section 197(2) r/w (3) of the Code. It is contended that what the accused did with the complainant whilst performing his duty was part of the duty of the accused and therefore the accused as a Police Officer was entitled to the protection given under Section 197 of the Code. Reliance has been placed by the learned Counsel on a three Judge decision of the Apex Court in the case of **Sankaran Moitra** v. **Sadhna Das and another**((2006) 4 SCC 584) particularly paras 23 and 24 wherein the Apex Court stated as follows:-

> "23. Coming to the facts of this case, the question is whether the appellant was acting in his official capacity while the alleged offence was committed or was performing a duty in his capacity as a police officer which led to the offence complained of. That it was the day of election to the State Assembly, that the appellant was in uniform; that the appellant travelled in an official jeep to the spot, near a polling booth and the offence was committed while he was on

the spot, may not by themselves attract Section 197(1) of the Code. But, as can be seen from the facts disclosed in the counter-affidavit filed on behalf of the State based on the entries in the general diary of Phoolbagan police station, it emerges that on the election day information was received in the police station at 1400 hours of some disturbance at a polling booth, that it took a violent turn and clashes between the supporters of two political parties were imminent. It was then that the appellant reached the site of the incident in his official vehicle. It is seen that a case had been registered on the basis of the incidents that took place and a report in this behalf had also been sent to the superiors by the Station House Officer. It is also seen and it is supported by the witnesses examined by the Chief Judicial Magistrate while taking cognizance of the offence that the appellant on reaching the spot had a discussion with the officer-in-charge who was stationed at the spot and thereafter a lathi-charge took place or there was an attack on the husband of the complainant and he met with his death. Obviously, it was part of the duty of the appellant to prevent any breach of law and maintain order on the polling day or to prevent the blocking of voters

or prevent what has come to be known as booth capturing. It therefore emerges that the act was done while the officer was performing his duty. That the incident took place near a polling booth on an election day has also to be taken note of. The complainant no doubt has a case that it was a case of the deceased being picked and chosen for ill-treatment and he was beaten up by a police constable at the instance of the appellant and the officer in charge of Phoolbagan police station and at their behest. If that complaint were true it will certainly make the action, an offence, leading to further consequences. It is also true as pointed out by the learned counsel for the complainant that the entries in the general diary remain to be proved. But still, it would be an offence committed during the course of the performance of his duty by the appellant and it would attract Section 197 of the Code. Going by the principle, stated by the Constitution Bench in Matajog Dobey it has to be held that a sanction under Section 197(1) of the Code of Criminal Procedure is necessary in this case.

24. We may in this context notice the decision in Rizwan Ahmed Javed Shaikh v. Jammal Patel. This Court was dealing with officers who were brought

within the protective umbrella of Section 197 of the Code by a notification issued under Section 197(3) thereof. Cognizance had been taken of an offence under Sections 220 and 342 of the Penal Code and Sections 147 and 148 of the Bombay Police Act. The gravamen of the charge was the failure on the part of the accused police officers to produce the complainants before a Magistrate within 24 hrs of their arrest for alleged offences under the Penal Code. The police officers having claimed the protection of Section 197(1) of the Code, this Court after referring to the earlier decisions held:

"The test to be applied to attract the applicability of Section 197(3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purported to be performed, the

> public officer would be protected".
>
> Going by the above test it has to be held that Section 197(1) of the Code is attracted to this case".

10. On the other hand, Mr. M. Amonkar, the learned Counsel on behalf of the complainant has submitted that abusing a person who had come to the Police Station is no more part of the duty of the Police Officer and therefore abuses given by him cannot give him any protection as claimed by the accused under Section 197 of the Code. The learned Counsel has placed reliance on two Judgments of the Apex Court in the case of **State of Himachal Pradesh** v. **M. P. Gupta**(AIR 2004 SC 730) and **Rakesh Kumar Mishra** v. **State of Bihar and others**((2006) 1 SCC 557). It would suffice in case reference is made to para 6 of the case in **Rakesh Kumar Mishra** v. **State of Bihar and others**(supra) wherein the Apex Court observed thus:-

> "The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged

to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it

must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty; if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official

> duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case".

11. The Constitution Bench of the Apex Court in the case of **Matajog Dobey** v. **H. C. Bhari**(AIR 1956 SC 44) had dealt with the scope of Section 197 of the Code and which decision since then has been referred to and followed by the Apex Court in its various decisions. As observed by the Constitution Bench slightly different tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The Constitution Bench has observed that the offence alleged to have been committed must have something to do, or must be related in some manner, with discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection

between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. The Constitution Bench further observed that what we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and the requirements of the situation. Referring to **Hori Ram Singh** v. **Emperor** (AIR 1939 F.C. 43) and other cases the Constitution Bench observed that:-

> "There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty".

12. As stated by the Apex Court in the case of **Pukhraj** v. **State of Rajasthan and another**((1973) 2 SCC 701) while the law is well settled, the difficulty really arises in

applying the law to the facts of any particular case. The intention behind the Section is to prevent public servants from being unnecessarily harassed. The Section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of their duty. The Section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the

same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. The expression such as the "capacity in which the act is performed", "cloak of office" and "professed exercise of office" may not always be appropriate to describe or delimit the scope of the Section. An act, merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty.

13. Reference to the case of **H. H. B. Gill** v. **King**(AIR 1948 PC 128), relied upon by His Lordship C. K. Thakker expressing his minority view in **Sankaran Moitra** v. **Sadhna Das and another**(supra) will be of advantage. It was stated by the Privy Council in that case that "a public servant can only be said to act or to purport to act in discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the Judgment which he delivers may be such an act, nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is

examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does by virtue of his office".

14. Another test laid down by the Apex Court, in another three Judges Judgment in the case of **Center for Public Interest Litigation and another** v. **Union of India and another**(2005 AIR SCW 5252) could be looked at. In this case, the Apex Court has stated that before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is made important and the protection of this Section is available if the act falls within the scope and range of its official duty. There cannot be any universal rule to determine whether there is a

reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

15. In the case at hand, there is no doubt that the accused was the Police Officer in charge of Police Station and had arrested the said two persons, the sons of Mrs. Catarina Po Fernandes presumably under Section 41 of the Code and subsequently, after the alleged incident, had initiated proceedings under Section 107 of the Code in which the complainant is alleged to have ordered them to be released with execution of personal bond. The accused might have been

investigating the arrest of the said accused at the time when the complainant went to the Police Station to inquire about the said arrest. However, it could not be said by any stretch of imagination that giving the abuses in relation to the complainant being of Scheduled Caste, etc. (as stated in the complaint and described hereinabove), was part of duty of the accused as a Police Officer who was investigating the said arrest of the said sons of Mrs. Catarina Po Fernandes. Applying this test, as laid down in the decision of the Apex Court, last mentioned, the accused would not have been answerable for charge of any dereliction of his official duty in case he had not uttered the abuses as alleged by the complainant.

16. A similar issue came up for consideration of the Division Bench of the Andhra Pradesh High Court in the case of **Abani Ch. Biswal** v. **State of Orissa**(1988 CRI. L. J. 1038) where the allegation was that the Police Officer had hurled abusive language at the complainant while the complainant was in the police lockup and the learned Division Bench held that the action of the Police Officer could not have been said to have been committed in the course of discharge of official duty. A

similar view was also taken in the case of **Keshaba Jena** v. **Pradipta Kishore Das**((1989) 2 OCR 34) and it was observed that no sanction was necessary where the Police Officer assaulted a person inside the Police Station even during investigation or where he abused a person. The aforesaid views were accepted and followed by His Lordship A. Pasayat while he was in Orissa High Court in the case of **Rama Chandra alias Ramapandan Sahu** v. **Niranjan Rout and another**(1992 CRI. L. J. 3041) and it is relying upon this case that the learned Sessions Judge negatived the plea of the accused that his acts were required to be protected by virtue of Section 197(3) r/w (4) of the Code.

16. In view of the above, the impugned Order dated 8-11-2000 of the learned Sessions Judge could not be faulted. There is no merit in this revision and the same is hereby dismissed.

N. A. BRITTO, J.

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